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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

US WEST, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUGGESTION OF MOOTNESS

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This case presents a First Amendment challenge to 47 U.S.C. 533(b), which prohibits local exchange carriers (LECs) from operating cable television systems within their service areas. On December 6, 1995, the Court heard oral argument in two consolidated cases from the Fourth Circuit raising the same issue. *United States* v. *Chesapeake & Potomac Tel. Co.*, No. 94-1893; *National Cable Television Ass'n* v. *Bell Atlantic Corp.*, No. 94-1900. When the government filed its petition in this case, we suggested that the Court hold it for the decision in No. 94-1893 and No. 94-1900, and dispose of it as appropriate in light of the decision in those cases.

On February 8, 1996, the President signed into law the Telecommunications Act of 1996, which, among other things, repeals Section 533(b). See Pub. L. No. 104-104, § 302(b) (1996). Section 302(b)(1) specifically states that "[s]ubsection (b) of Section 613 (47 U.S.C. 533(b)) is repealed." The legislation does not contain any specific effective date applicable to that repealing provision, and so it took effect on the date of the President's signature. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

Because the provision under challenge in this case has been repealed, the case is now moot. *Burke* v. *Barnes*, 479 U.S. 361, 363-364 (1987); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). The complaints in this case requested a declaration that Section 533(b) is unconstitutional and an injunction against its enforcement; the plaintiffs did not request damages or any other relief based on past enforcement of the repealed provision. Therefore, former Section 533(b) has no further, continuing effect on the parties before the Court.

Under the Communications Act of 1934, as now amended by the Telecommunications Act of 1996, no provision prevents a LEC from establishing a new cable system, in competition with the incumbent cable operator, in its own service area. Section 302(a) of the Telecommunications Act of 1996 does contain some restrictions on acquisition of incumbent cable operators by LECs. Under a new Section 652 of the Communications Act, no LEC or its affiliate may acquire more than a 10% financial interest in any incumbent cable operator offering cable service in its service area; conversely, no cable operator may acquire a similar financial interest in any LEC offering local telephone service within its franchise area. The

new legislation also provides several exceptions to these restrictions on acquisitions, for small cable systems, and for cable systems operating in nonurban areas; in addition, a LEC may acquire a cable system in its service area if (among other things) the cable system is not in the top 25 television markets, the market is served by more than one cable operator, and the subject cable operator is not the one with the most subscribers in the market. The legislation further authorizes the FCC to waive the restriction on acquisitions of incumbent cable operators by LECs under certain circumstances. Those provisions (which, of course, have not yet been considered by any court) are not at issue in the cases presently before the Court, and so they do not prevent the cases from becoming moot as a result of the enactment of the 1996 Telecommunications Act.

Because the provision under challenge has been repealed, this case is now moot. The proper course is for the Court to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case, with instructions to dismiss as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950); *Alabama* v. *Davis*, 446 U.S. 903 (1980); *State Fair of Texas* v. *United States Consumer Product Safety Comm'n*, 454 U.S. 1026 (1981).

For the foregoing reasons, the petition for a writ of certiorari should be granted, judgment of the court of appeals should be vacated, and the case should be remanded with instructions to dismiss as moot.

Respectfully submitted.

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